

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

UNITED STATES OF AMERICA,)	No. 3:16-cr-05110-RJB
)	
Plaintiff,)	SECOND ORDER ON DEFENDANTS'
)	MOTION TO COMPEL DISCOVERY
v.)	
)	
DAVID TIPPENS,)	
)	
Defendant.)	

UNITED STATES OF AMERICA,)	No. 3:15-cr-00387-RJB
)	
Plaintiff,)	SECOND ORDER ON DEFENDANTS'
)	MOTION TO COMPEL DISCOVERY
v.)	
)	
GERALD LESAN,)	
)	
Defendant.)	

UNITED STATES OF AMERICA,)	No. 3:15-cr-00274-RJB
)	
Plaintiff,)	SECOND ORDER ON DEFENDANTS'
)	MOTION TO COMPEL DISCOVERY
v.)	
)	
BRUCE LORENTE,)	
)	
Defendant.)	

THIS MATTER comes before the Court on Defendants' Motion to Compel Discovery. Dkt. 54.¹ The Court has considered the motion, the Government's Response (Dkt. 73), Defendants' Reply (Dkt. 78) and the remainder of the file herein. The Court previously ruled on discovery requests ##2-6 and 9-12. Dkt. 80. This order addresses the remaining discovery requests ##1, 7, and 8.

The difficult question before the Court is whether the Government should be shielded from providing discovery responsive to requests ##1, 7, and 8. The Government relies on Fed.R.Crim.P. 16(a)(2) (##1 and 7), invokes several privileges (##1 and 7), and requests an *ex parte* and *in camera* hearing to review classified information (#8). The Court assumes that the Government has disclosed exculpatory discovery required under *Brady* and its progeny, and that any potential discovery requested by ##1, 7, and 8 is confined to the parties' disagreement about the scope of Rule 16.

1. All records related to the Government's review and approval of Operation Pacifier.

This is a blanket request that amounts to a fishing expedition and is overbroad. Defendants' motions should be denied as to this discovery request.

7. Copies of all legal memoranda, emails and other documents related to the legality of the FBI's operation of Playpen (and the distribution of child pornography by the Government), including requests for agency/departamental approvals of the undercover operation of Playpen and any communications with Main Justice or the Office of General Counsel at the FBI.

This discovery requests seeks documents "related to the legality of the FBI's operation of Playpen," which is another way of requesting documents made by an attorney for the government. Fed.R.Crim.P. 16(a)(2) excepts the Government from the obligation to disclose "internal government documents made by an attorney for the government . . . in connection

¹ Docket numbers refer to *USA v. Tippens*, Case No. 3:16-cr-05110-RJB, but the parties filed identical motions and responsive briefing in all three cases. See *United States v. Lesan*, Case No. 3:15-cr-00387-RJB (Dkts. 100, 120, 125), *United States v. Lorente*, Case No. 3:15-cr-00274-RJB (Dkts. 113, 137, 142). This order pertains to the pending motions to compel in all three cases.

1 with investigating or prosecuting the case.” The discovery request falls under this exception.
2 Defendants’ motions should be denied as to this discovery request.

3 **8. Copies of all correspondence, referrals and other records indicating whether the**
4 **exploit used in the Playpen operation has been submitted by the FBI or any other**
5 **agency to the White House’s Vulnerability Equities Process (VEP) and what, if any,**
6 **decision was made by the VEP.**

7 Defendants argue that this discovery request is material “because federal agencies are
8 required to submit information about computer security vulnerabilities . . . for VEP review and
9 approval to ensure that use of the malware complies with all applicable laws and does not pose
10 substantial risks to the public.” Dkt. 54 at 4.

11 The Government argues that the requested discovery is not material, and that to the
12 extent the discovery exists, it is classified. The Government also requests an *ex parte* and *in*
13 *camera* hearing. Dkt. 73 at 9.

14 Defendants’ discovery request is overbroad and again runs afoul of Fed.R.Crim.P.
15 16(a)(2). However, the request seeks discovery material to Defendants’ motion to dismiss for
16 outrageous conduct. To avoid another round of discovery briefing that could delay trial or the
17 resolution of other motions, the Court should narrow the scope of the request. The Government
18 should inform Defendants and the Court in a brief memorandum or similar format two issues:
19 (1) whether the “exploit used in the Playpen operation . . . [was] submitted . . . to the [VEP],”
20 and (2) the decision or outcome, if any, made by the VEP. If answering these two simple
21 questions requires the Government to reveal classified information, the Government may make
22 a showing to persuade the Court of proposed limitations.

23 THEREFORE, Defendants’ Motions to Compel Discovery (Dkt. 54) are DENIED as to
24 discovery requests #1 and #7 and GRANTED IN PART and DENIED IN PART as to
25 discovery request #8. The Government’s memorandum on discovery request #8 must be filed
26 by **Friday, October 28, 2016** and is limited to five pages.

It is so ordered.

1 DONE this 24th day of October, 2016.

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3 ROBERT J. BRYAN
4 United States District Judge
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